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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

ROY McCLOUD FRANKS,

Defendant-Petitioner,

versus

STATE OF LOUISIANA,

Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

DEE D. DRELL
GRAVEL, ROBERTSON & BRADY
711 Washington Street
Post Office Box 1792
Alexandria, LA 71301

Attorneys for
Defendant-Petitioner

THE QUESTION PRESENTED

Whether petitioner was denied rights guaranteed him under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, including his right to trial by jury, his right to confront his accusers, his right to self-representation, and his right to due process, by virtue of the failure by the Honorable B. I. Berry, Judge of the Fifth Judicial District Court for Richland Parish, Louisiana, to adequately explain defendant's rights upon his pleas of guilty and to interrogate the defendant as to his understanding of his rights pursuant to said pleas.

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STATE OF LOUISIANA,

Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF LOUISIANA

ROY McCLOUD FRANKS, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Louisiana which affirmed the conviction of your petitioner for the offenses of attempted aggravated rape and armed robbery based upon a plea of guilty from the Fifth Judicial District Court, Richland Parish, Louisiana.

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OPINIONS BELOW

Fifth Judicial District Court
Richland Parish, Louisiana

Attached to this petition are certified copies of the Grand Jury Indictments, as amended, charging petitioner with attempted aggravated rape and armed robbery. (See Appendix A and B.) Also attached to and made a part of this petition is a transcription from the Fifth Judicial District Court for Richland Parish, Louisiana, of the dialogue between petitioner and the sentencing judge, the Honorable B. I. Berry. (See Appendix C.) Also attached are copies of the motions to withdraw plea of guilty filed by defendant. (See Appendix D and E.)

Supreme Court of Louisiana

The relevant opinion of the Louisiana Supreme Court bears the following style and caption: State of Louisiana v. Roy McCloud Franks, Docket Numbers 67,371 and 67,372. A copy of the opinion is attached to this petition and made a part hereof. (See Appendix F.)

JURISDICTION

The decision of the Louisiana Supreme Court affirming petitioner's convictions based upon his pleas of guilty was entered on November 10, 1980. No application for rehearing was made in the Louisiana Supreme Court on this appeal. Mover's

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Petition for Writ of Certiorari is due on or before January 9, 1981.

The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code Section 1257(3), and Rule 17 of the Rules of this Honorable Court.

THE QUESTION PRESENTED

Whether petitioner was denied rights guaranteed him under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, including his right to trial by jury, his right to confront his accusers, his right to self-representation, and his right to due process, by virtue of the failure by the Honorable B. I. Berry, Judge of the Fifth Judicial District Court for Richland Parish, Louisiana, to adequately explain defendant's rights upon his pleas of guilty and to interrogate the defendant as to his understanding of his rights pursuant to said pleas.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment, United States Constitution:

> "No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of

war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. Fourteenth Amendment, Section 1, United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Louisiana Revised Statutes, Title 14, Section 42:

"Aggravated rape is a rape, heterosexual or homosexual, comitted where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) Where the victim resists the act to the utmost, but whose resistance is overcome by force;

(2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution; or

(3) Where the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

Whoever commits the crime of aggravated rape shall be punished by life imprisonment without benefit of parole, probation or suspension

of sentence." [as amended through Act 343 of 1977]

5. Louisiana Revised Statutes, Title 14, Section 27:

"A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circimstances, he would have actually accomplished his purpose.

B. Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.

C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.

D. Whoever attempts to commit any crime shall be punished as follows:

(1) If the offense so attempted is punishable by death or life imprisonment, he shall be imprisoned at hard labor for not more than fifty years;

(2) If the offense so attempted is theft or receiving stolen things, and is not punishable as a felony, he shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both. If the offense so attempted is theft or receiving stolen things, and is punishable as a felony, he shall be fined not more than two hundred dollars, or imprisoned not more than one year, or both;

(3) In all other cases he shall be fined or imprisoned or both, in the same manner as for the offense attempted; such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted, or both." [as amended through Act 132 of 1975]

6. Louisiana Revised Statutes, Title 14, Section 64:

A. Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

B. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five years and for not more than ninety-nine years, without benefit of parole, probation or suspension of sentence."

STATEMENT OF THE CASE

Mover, Roy McCloud Franks, was indicted by the Richland Parish Grand Jury for the offenses of aggravated rape, aggravated kidnapping and armed robbery under Louisiana statutes. Pursuant to a plea bargain between the State and defendant, negotiated with his court appointed attorney, defendant withdrew his former pleas of not guilty and entered pleas of guilty to attempted aggravated rape and armed robbery. The charge of aggravated kidnapping was dismissed. When petitioner's guilty pleas were taken in Open Court on October 9, 1978, he was interrogated by the trial judge, the Honorable B. I. Berry. (See Appendix C.) After a presentence investigation, defendant was sente ced by the trial court to serve eighteen years at hard labor on the charge of attempted aggravated rape and to serve thirty years at hard labor without benefit of parole, probation or suspension of sentence, for the charge of armed robbery. These sentences were directed to be consecutive. On defendant's first appeal to the Louisiana Supreme Court, his convictions were affirmed, but the Louisiana Supreme Court found that the trial judge had failed to state for the record the conclusions taken into account and the

factual basis necessary for imposing sentence as required by the Louisiana Code of Criminal Procedure. The Louisiana Supreme Court therefore vacated the sentence and remanded the case to the trial court for resentencing, State v. Franks, 373 So.2d 1307 (La. 1979). While the case was on remand, defendant filed motions to withdraw his guilty plas to both charges based on the claims that his pleas were not made voluntarily and were not made with his understanding of the nature of the charges against him. These motions were denied by the trial court. On the first appeal, the issue of the adequacy of the examination into petitioner's understanding of the charges against him and his rights was raised, but was not decided by the Louisiana Supreme Court based on the record before it. Thus, the issues presented in this petition were once again raised before the trial court by the filing of these motions to withdraw guilty pleas and were fully considered by the Supreme Court opinion dated November 10, 1980, referenced hereinabove. (See Appendix E and F.)

Petitioner's motions to withdraw his guilty pleas were based, in part, upon allegations that the defendant had not been informed by the court of all of the elements of each offense with which he was originally charged or to which he entered pleas of guilty. In addition, it was alleged that defendant did not fully understand the charges against him or the rights which may have been waived by the "Boykin" examination.

In its second opinion dated November 10, 1980, the Louisiana Supreme Court,

referring to the record of the examination by the trial judge, concluded that the trial judge had extensively interrogated defendant prior to accepting his pleas of guilty and found that the defendant was clearly informed of the charges against him and that defendant had stated he understood those charges. The Louisiana Supreme Court likewise concluded that defendant was also informed of the various constitutional rights he would forego by pleading guilty. The Supreme Court of Louisiana also noted that defendant had had ample assistance of counsel in making his decision to plead guilty. Therefore, the court concluded that the original guilty pleas were made voluntarily with understanding of the nature of the charges, and therefore, the trial court did not abuse its discretion in refusing to permit the defendant to withdraw his guilty pleas.

REASONS FOR GRANTING THE WRIT

The issues presented in this petition were, it is submitted, passed upon by this Honorable Court in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). In Boykin, this Court, noting the involvement of several federal constitutional rights involved in any waiver during submission of a guilty plea, stated that for there to be a proper rejection of such constitutional rights, it must first be shown by the record that the defendant "voluntarily, intelligently and understandingly" waived the rights at issue. As required by this Court, the responsibility of the trial judge is great:

> "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." Boykin, at 1712.

During the examination of the defendant before the entry of his pleas on October 9, 1978, the defendant informed the court that he was a slow learner, hd a possible head injury, had had prior psychiatric treatment, and was presently under medication for headaches, dizziness and passing out. Given these circumstances, the court was under a great duty, it is suggested, to learn more about these conditions and to insure that they did not affect defendant's understanding of the court's inquiry. It is particularly important to note that there is no indication in the court's examination as to the factual basis of the charge itself and especially no acknowledgement by the defendant of having committed any acts giving basis to the violation of the statutes involved, and no indication that the judge had made an independent determination of the facts such as to justify acceptance of the plea at that time. Moreover, it is suggested that on the face of the record, the delineation of elements of the offenses with which defendant was charged was not even minimally acceptable.

In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 562 (1975), this

Honorable Court affirmed the Sixth Amendment likewise contemplated that a defendant had a constitutional right to defend himself. Nowhere in the examination conducted by Judge Berry was it shown that petitioner was even advised of his right to represent himself, if he desired, and nowhere in such examination does it reflect a waiver of his right. It is clear in view of the Faretta decision that a court is required to make a thorough inquiry into a defendant's knowledge of his right to counsel and his right of self-representation. Lower courts in the federal system have agreed that this is required. See, for example, Martin v. Wyrick, 433 F.Supp. 921 (W.D. Mo. 1977), reversed on other grounds, 568 F.2d 583 (8th Cir. 1978). Likewise, this Honorable Court has made it clear that a plea of guilty may be involuntary if the defendant has not received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process", Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976), citing Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941).

In addition, the United States Court of Appeals for the Fifth Circuit in Burden v. Alabama, 584 F.2d 100 (5th Cir. 1978), made it clear that a guilty plea cannot be voluntary if the defendant is not informed of the elements of the crime with which he is charged. Citing Henderson v. Morgan, supra, and even considering the fact that the defendant there had signed an "Ireland form", where there was no specific recital of the elements of the crime, Burden's plea was deemed to have been involuntary.

Turning to an analysis of the examination in this case, it is noted again that defendant Franks was not at all informed of his right to represent himself. In addition, although the trial judge did state the general nature of the charges to which defendant was pleading guilty, to-wit: attempted aggravated rape and armed robbery, he failed to define the elements of these offenses.

As to the attempted aggravated rape charge, for example, the record is void of any definition of aggravated rape or any recitation of the three circumstances where aggravated rape can be committed. Additionally, no definition of attempt whatsoever was provided the defendant. Surely defendant had a right to know, at least, that mere preparation would not suffice to constitute an attempt!

Additionally, as to the armed robbery charge, the record is void of a definition of robbery, and defendant was not told that armed robbery must, under Louisiana law, be "by use of force or intimidation".

These problems are not merely technical ones. Petitioner was charged with extremely serious offenses. It is not too much to ask to require that a trial judge in all cases be particularly conscientious in explaining the accused's rights, and the elements of the offenses. Indeed, it is axiomatic that the accused's conduct fit within the framework of these elements. There is, after all, a broad range of human conduct which without specific elements, is not criminal. When an accused pleads guilty, indeed, the

state is relieved of the burden of proof beyond a reasonable doubt; the accused is admitting his guilt from his own mouth. Unless the actual elements of the offense, and the accused's knowledgeable responses appear of record, a reviewing court has no real way of knowing whether the accused's actions constituted a crime.

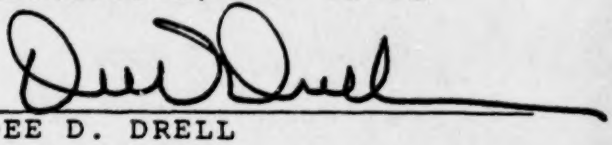
For all of these reasons, the examination conducted by the court, commonly referred to as a "Boykin" examination, is woefully inadequate and the Louisiana Supreme Court's refusal to reverse the conviction and failure to remand this cause for trial constitutes clear error on the face of the record violative of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Louisiana Supreme Court below is erroneous. For the reasons assigned, the present petition for Writ of Certiorari should be granted.

Respectfully submitted,

GRAVEL, ROBERTSON & BRADY
Post Office Box 1792
711 Washington Street
Alexandria, LA 71301



DEE D. DRELL

CERTIFICATE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served by First Class United States Mail, properly addressed and postage prepaid, to each of the following:

Attorney General William Guste, State Capitol, Baton Rouge, Louisiana; and

Assistant District Attorney William Coenen, Richland Parish Courthouse, Rayville, Louisiana,

this 7th day of January, 1981.

Alexandria, Louisiana.

ATTORNEY FOR MOVER

Appendices

APPENDIX A

STATE OF LOUISIANA
Fifth Judicial District Court
Parish of Richland

STATE OF LOUISIANA

versus No. 30,970

ROY McCLOUD FRANKS

(aggravated rape)

THE GRAND JURORS of the State of Louisiana, duly empaneled, sworn and charged in and for the body of the Parish of Richland, in the name and by the authority of said State, upon their oath, present:

That one ROY MCCLOUD FRANKS

late in the Parish of Richland, on the 24th day of August in the year of our Lord, One Thousand, Nine Hundred and seventy-eight with force and arms in the Parish of Richland aforesaid, and within the jurisdiction of the Fifth Judicial District Court in and for the Parish of Richland, "did wilfully and unlawfully violate Revised Statutes 14:27, in that he attempted to commit aggravated rape upon one Kathy Scurria, aggravated rape being defined in R.S. 14:42.

Amended October 10, 1978, William R. Coenen, Jr.

contrary to the form of the Statute of

the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

/s/William R. Coenen, Jr.
District Attorney for
the Fifth Judicial
District.

A TRUE COPY: ATTEST
Lucille Stephens
Dy. Clerk 5th District Court
Richland Parish, LA.

Duly Recorded in Indictment Book 7 Page 427 This 6 Day of September A.D., 1978

/s/D. B. McKay
Clerk Fifth District
Court

APPENDIX B

STATE OF LOUISIANA
Fifth Judicial District Court
Parish of Richland

STATE OF LOUISIANA

versus No. 30,971

ROY MCCLOUD FRANKS

(Armed robbery)

THE GRAND JURORS of the State of Louisiana, duly empaneled, sworn and charged in and for the body of the Parish of Richland, in the name and by the authority of said State, upon their oath, present:

That one ROY MCCLOUD FRANKS

late in the Parish of Richland, on the 24th day of August in the year of our Lord, One Thousand, Nine Hundred and seventy-eight with force and arms in the Parish of Richland aforesaid, and within the jurisdiction of the Fifth Judicial District Court in and for the Parish of Richland "did wilfully and unlawfully violate Revised Statutes 14:64, relative to armed robbery, in that he while armed with a dangerous weapon, to-wit: ROY MCCLOUD FRANKS robbed one Kathy Scurria of $70.00 in the lawful money of the United States of America,"

Amended October 9, 1978, William R. Coenen, Jr.

contrary to the form of the Statute of the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

/s/William R. Coenen,Jr.
District Attorney for
the Fifth Judicial
District.

A TRUE COPY: ATTEST
Lucille Stephens
Dy. Clerk 5th District Court
Richland Parish, LA.

Duly Recorded in Indictment Book 7 Page 427 This 6 Day of September A.D., 1978

/s/D. B. McKay
Clerk Fifth District
Court

APPENDIX C

STATE OF LOUISIANA

VS. NO. 30,970 - 30,792

ROY MC CLOUD FRANKS
(Armed Robbery)
(Attempted Aggravated Rape)

The following statements were taken in Open Court on the 9th day of October, A.D., 1978:

Court: Mr. Franks, before accepting your plea of guilty I have to ask you some questions and if you don't understand the question, will you stop me and ask me or your attorney to explain it to you? Will you do that?

Defendant: Yes, sir.

Court: Is your name Roy McCloud Franks?

Defendant: Yes, sir.

Court: Now I understand, Mr. Franks, that you desire to enter a plea of guilty in charge #30,970 of Attempted Aggravated Rape, upon one Kathy Scurria, and in #30,971 of armed robbery, is this correct?

Defendant: Yes, sir.

Court: How old are you, sir?

Defendant: Twenty-two.

Court: And what education have you had?

Defendant: About the 5th or 6th grade.

Court: What type of work or business experience have you had?

Defendant: Farming, welding.

Court: Have you had an opportunity to discuss all of the facts of these cases and also any possible defenses that you might have with your attorney?

Defendant: Yes, sir.

Court: Are you satisfied that your attorneys have fully considered these cases and also any possible defenses that you might have?

Defendant: Yes, sir.

Court: And are you satisfied that your attorneys have competently advised you about these cases?

Defendant: Yes, sir.

Court: Do you understand the nature of the charges? Now in

#30,970, the charge is that on or about August 24th, 1978, you did violate the Revised Statute Title 14:27 and 14:42 in that you did attempt to commit aggravated rape upon one Kathy Scurria, do you understand that charge?

Defendant: No, sir, not quite.

Court: Attempted aggravated rape is the charge that was alleged to have occurred upon one Kathy Scurria on or about August 24th, 1978. Attempted aggravated rape, do you understand that charge?

Defendant: Yes, sir.

Court: Do you understand that if you plead guilty to that charge it will be the duty of the court to adjudge you guilty?

Defendant: Yes, sir.

Court: The charge of attempted aggravated rape carries a maximum sentence, that is, the most that you could get under this charge, is imprisonment at hard labor for not more than 50 years, do you understand that?

Defendant: Yes, sir.

Court: Now the other charge is armed robbery. That is, that

on #30,971, State of Louisiana Versus Roy McCloud Franks, that on the 24th day of August, 1978, you violated the law by committing armed robbery in that you while armed with a dangerous weapon robbed one Kathy Scurria of $70.00 of lawful money. Do you understand that charge?

Defendant: Yes, sir.

Court: And do you understand that if you enter a plea of guilty to that charge, it will be the duty of the Court to adjudge you guilty, and that the maximum sentence, that is the most sentence that could be imposed on the armed robbery charge, is imprisonment at hard labor for not less than 5 years, and for not more than 99 years, without benefit of parole, probation, or suspension of sentence, do you understand that?

Defendant: Yes, sir.

Court: And these are the charges that you wish to enter a plea of guilty to?

Defendant: Yes, sir.

Court: Mr. Franks, do you believe any of your Constitutional rights have been violated in any way in connection with

these cases?

Defendant: No, sir.

Court: And have you discussed this facet of the case with your attorneys?

Defendant: Yes, sir.

Court: Have the police officers obtained any evidence have they seized any evidence connected with these cases, that you know of?

Defendant: I wouldn't know.

Court: You don't know of any, is that your answer?

Defendant: No, sir.

Court: Have you made any statements, confessions, or admissions, or answered any questions from the law enforcement officers?

Defendant: Yes, sir.

Court: Now in connection with any questioning that you may have undergone, and in connection with any statements that you may have made, were you first warned that you had a right to remain silent, that any statement could be used against you in Court, that you had a right to counsel prior to and during

any questioning, that if you were unable to employ an attorney and desired one, the Court would appoint an attorney to represent you, and that any questioning would have to be terminated whenever you so requested? Were you given those warnings?

Defendant: Yes, sir.

Court: At the time that you made any statement, or answered any questions, do you think that any of your Constitutional rights were violated?

Defendant: No, sir.

Court: And have you discussed these matters with your attorneys?

Defendant: Yes, sir.

Court: In connection with your making any statement, and in connection with your answering any questions, was any violence, or force, or duress, exercised upon you, or were you or any member of your family threatened, or intimidated in any way?

Defendant: Not that I know of.

Court: Has anyone, including your attorney, or the District Attorney, made any promise or promises, of any kind, or any

promises of leniency, in order to induce you to enter a plea of guilty?

Defendant: No, sir.

Court: Were any statements which you may have made, or any answers to questions which you may have given, was this done freely and voluntarily by you?

Defendant: Yes, sir.

Court: Do you understand that normally you have a Constitutional right to a trial by jury, but by pleading guilty you will be waiving and giving up that right, and you will not be afforded a jury trial?

Defendant: Yes, sir.

Court: Do you also understand that if you should plead not guilty the district attorney would have the burden of proving your guilty beyond a reasonable doubt before a jury?

Defendant: Yes, sir.

Court: Do you also understand that if you should plead not guilty, you would have the right to a speedy and public trial by jury, and in that trial you would have the right to see, and hear, and cross examine all witnesses against you?

Defendant: Yes, sir.

Court: Also in the event of a jury trial you would have the right to use the process of the Court in order to obtain any evidence or witnesses that might be favorable to you?

Defendant: Yes, sir.

Court: Also in the event of a jury trial you would have the right to remain silent, and if you should elect to remain silent and not testify that fact could not be construed against you in any way. Do you understand that?

Defendant: Yes, sir.

Court: Now understanding all of these rights, do you still desire to waive them and to enter a plea of guilty?

Defendant: Yes, sir, I do.

Court: Mr. Franks, are you under the influence of any medicine, or drug, or alcohol at this time?

Defendant: Yes, sir, I am taking medicine.

Court: What sort of medicine?

Defendant: Well, I talked to the doctor that examined me and he wouldn't tell me what was

wrong with me, but I have been having headaches, and dizzy spells, and passing out a lot.

Court: Is it a medicine that affects your reasoning ability and your ability to understand what I am talking to you about now?

Defendant: No, sir.

Court: When was the last time that you had any of this medicine?

Defendant: This morning about 8:00 o'clock.

Court: And it is a medicine that was prescribed by a doctor?

Defendant: Yes, sir.

Court: And does it affect your mental processes so that you are not able to understand?

Defendant: No, sir.

Court: You understand what we are doing here today?

Defendant: Yes, sir.

Court: Pardon?

Defendant: Yes, sir.

Court: Do you use alcohol?

Defendant: I have drank a little.

Court: When was the last time that you had any alcohol?

Defendant: It has been a couple of months.

Court: Has it been recently?

Defendant: No, sir.

Court: Have you ever had any head injuries, or undergone any psychiatric treatment, or been confined in any mental institution?

Defendant: No, sir, outside of the school that I went to.

Court: I beg your pardon?

Defendant: Outside of the school that I went to for slow learners. That is what it was supposed to have been.

Court: No mental problems?

Defendant: I seen some psychiatrist.

Court: How long ago was this?

Defendant: This was when I was going to school, I don't rightly know right now.

Court: In high school, or grammar school?

Defendant: Grammar.

Court: Grammar school. Many years ago?

Defendant: Yes, sir.

Court: Do you believe that you understand everything transpiring here today, and that you are competent to make the decision to enter the plea of guilty?

Defendant: Yes, sir.

Court: And you are entering this plea freely, and voluntarily, and as a result of your own independent decision?

Defendant: Yes, sir.

Court to Mr. Ellis:

Court: Now Mr. Ellis, has this defendant been competent and able to discuss the case and cooperate with you in your representation of him?

Mr. Ellis: Yes, he has, Your Honor.

Court: Have you discussed the facts of the case in detail with the defendant?

Mr. Ellis: I have.

Court: Are you satisfied that there are no meritorious defenses that the defendant might raise?

Mr. Ellis: I am.

Court: And are you satisfied that the Defendant's Constitutional rights have been observed?

Mr. Ellis: They have.

Court: And are you satisfied that the defendant is entering this plea freely, and voluntarily, with an understanding of the nature of the charges and the consequences of the pleas?

Mr. Ellis: I am.

Court: Upon this record before me I find that the pleas are entered freely, voluntarily, with an understanding of the nature of the charges and the consequences of the pleas. The pleas are therefore accepted and the Court now adjudges the defendant guilty of the offenses charged in the bills.

Court: Mr. Franks, at this time I would advise you of your right to appeal from any sentence and judgment of the Court. Do you understand what appealing a case means?

Defendant: No, sir.

Court: Appealing a case means sending the record made in this Court to the Supreme

Court, the higher Court, for review to determine whether or not there has been any errors made here. Do you understand that?

Defendant: I think so.

Court: All of the record is being recorded, and record is being made, and this whole record be sent to the higher Court for review, that is what an appeal is. Do you understand that?

Defendant: Yes, sir.

Court: If you desire to take an appeal, a notice of appeal must be filed with the Clerk of Court within fifteen days from time of sentence and judgment, do you understand that?

Defendant: Yes, sir.

Court: You are entitled to have an attorney represent you on appeal, and if you indigent, that is financially unable to employ an attorney, the Court will appoint an attorney to represent you without cost to you. Do you understand that?

Defendant: Yes, sir.

Court: If you are unable to pay the costs of the appeal, you have the right to apply to the Court for leave to appeal in forma pauperis, which when granted would relieve you from having to pay the costs. Do you understand that?

Defendant: Yes, sir.

Court: Thank you, that will be all. You may step down.

Mr. Ellis: Your Honor, on behalf of the defendant, Mr. Boies and I ask for a pre-sentence investigation prior to any sentence.

Court: Let the minutes show that a pre-sentence investigation and report is requested, returnable within 45 days. And would you notify the probation officers of the request, Mrs. Stephens?

- - -

STATE OF LOUISIANA

PARISH OF RICHLAND

I, Regina J. Mulhern, Deputy Clerk of Court, Parish of Richland, State of Louisiana, do hereby certify that the foregoing pages numbered from one (1) to thirteen (13) contain a true and correct transcript of the testimony taken in the cases of:

State of Louisiana
Vs. No. 30,970 - 30,972
Roy McCloud Franks
(Armed Robbery)
(Attempted Aggravated Rape)

IN FAITH WHEREOF, Witness my hand and seal of office on this the 18th day of October, A.D., 1978.

/s/Regina J. Mulhern
Deputy Clerk of Court,
Parish of Richland,
State of Louisiana,
Fifth District Court

APPENDIX D

Criminal Docket Number 30,970

FIFTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF RICHLAND

STATE OF LOUISIANA

STATE OF LOUISIANA

VS.

ROY MCCLOUD FRANKS

MOTION TO WITHDRAW PLEA OF GUILTY

NOW INTO COURT, comes the defendant, ROY MCCLOUD FRANKS, through undersigned counsel, for the purpose of this Motion to Withdraw the Plea of Guilty and, with respect, informs the Court that:

1.

Defendant, ROY MCCLOUD FRANKS was charged by Indictment number 30,970 and 30,971 in the Fifth Judicial District Court with having committed aggravated rape and armed robbery on the same alleged victim on August 24, 1978. After a pre-sentence investigation, the Judge sentenced ROY MCCLOUD FRANKS on the charge of armed robbery to be imprisoned at hard labor for thirty years without benefit of parole, probation or suspension of sentence. The Judge sentenced the defendant on the charge

of attempted aggravated rape (arising out of the same set of facts) to a sentence of eighteen years at hard labor and ordered the sentences to run consecutively.

2.

Defendant appealed to the Louisiana Supreme Court and reserved Six Assignments of Error. The Louisiana Supreme Court in docket numbers 63,849 and 63,850 on July 5, 1979, handed down a decision in which the convictions were affirmed but that the sentences were vacated and the case remanded to the District Court for resentencing with a full statement of the reasons for the particular sentences imposed.

Accordingly, at this time the sentencing of the defendant has been vacated and set aside and this Motion to Withdraw Pleas of Guilty comes before sentencing in the legal sense.

3.

The defendant is a 22 year old elementary school drop-out suffering from a mental condition requiring psychiatric consultation, and he had been charged with the completed offense of aggravated rape although the District Attorney's Post Sentence Statement of Facts indicates that merely an attempt had been committed.

4.

Defendant alleges that he has not been informed of the Court of all of the elements of each offense with which he was originally charged or to which he entered pleas

of guilty. Accordingly, the pleas of guilty cannot be free and voluntary.

5.

The defendant does not fully understand the charges against him or the rights which may have been waived in the Boykin Examination.

6.

For these, and other reasons, to be shown at the hearing of this Motion, defendant desires and is entitled to withdraw his former plea of guilty and to be rearraigned on the charge.

WHEREFORE, IT IS PRAYED THAT after a contradictory evidentiary hearing that the defendant be allowed to withdraw his former plea of guilty in this case and be rearraigned on the charge.

GRAVEL, ROY & BURNES
/s/Richard V. Burnes

711 Washington Street
Alexandria, Louisiana
71301

CERTIFICATE

I certify that a copy of the above and foregoing Motion to Withdraw Plea of Guilty has been furnished to the District Attorney's Office this 24th day of October, 1979.

/s/Richard V. Burnes

APPENDIX E

[Appendix E is identical to Appendix D, except the Docket Number is 30,971.]

APPENDIX F

SUPREME COURT OF LOUISIANA

NOS. 67,371 and 67,372

STATE OF LOUISIANA

V.

ROY McCLOUD FRANKS

November 10, 1980

ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT, PARISH OF RICHLAND, STATE OF LOUISIANA HONORABLE B. I. BERRY, JUDGE

* * * *

MARCUS, Justice

Roy McCloud Franks was originally indicted for aggravated rape, aggravated kidnapping and armed robbery (La. R.S. 14:42, 14:44 and 14:64). Pursuant to a plea bargain, defendant withdrew his former pleas of not guilty and entered pleas of guilty to attempted aggravated rape and armed robbery. The charge of aggravated kidnapping was dismissed. The trial judge accepted the guilty pleas after determining that they were made voluntarily with understanding of the nature of the charges. A presentence investigation was ordered by the court. Subsequently, defendant was sentenced to serve eighteen years at hard labor for the attempted

aggravated rape and thirty years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery. The court expressly directed that the sentences be served consecutively.

On appeal, defendant's convictions were affirmed but, finding that the trial judge had failed to state for the record the conclusions taken into account and the factual basis therefor for imposing sentence as required by La. Code Crim. P. art. 894.1 and to particularize the justification for the imposition of consecutive rather than concurrent sentences for crimes arising from a single course of conduct, we vacated the sentences and remanded the case to the trial court for resentencing. State v. Franks, 373 So.2d 1307 (La. 1979).

On remand and prior to resentencing, defendant filed a motion to appoint a sanity commission and a motion to withdraw his guilty pleas. After a hearing, the trial judge denied the motions. Subsequently, defendant was sentenced to serve ten years at hard labor for the attempted aggravated rape and forty years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery. The court expressly directed that the sentences be served concurrently. On appeal, defendant relies on five assignments of error for reversal of his convictions and sentences.

ASSIGNMENT OF ERROR NO. 1

Defendant contends the trial judge erred in denying his motion to appoint a sanity commission. He argues that he presently

lacks the mental capacity to understand the proceedings against him or to assist in his defense.

At the hearing on the motion, Mrs. Lois Franks, defendant's mother, testified that defendant had attended a school for slow learners for two or three years prior to quitting school at the age of sixteen. She also stated that defendant had been under medication since his incarceration on these charges and that he had undergone some form of psychiatric evaluation while incarcerated in the penitentiary at Parchman in Mississippi on a charge of grand larceny. Dr. J. C. Ellington testified that based on his memory, he had observed no signs of retardation in defendant and had no opinion concerning defendant's present ability to understand. In denying the motion, the trial judge stated that he found nothing in the evidence presented at the hearing which raised a reasonable doubt that defendant was unable to understand the proceedings against him and to assist his counsel.

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense. La. Code Crim. P. art. 641. The issue of present insanity or mental incapacity to proceed may be raised at any stage of the proceedings, even after conviction. State v. Henson, 351 So.2d 1169 (La. 1977); State v. Luquette, 275 So.2d 396 (La. 1973). When the issue is raised, the trial court is required to order a mental examination of the defendant when it has reasonable

ground to doubt the defendant's mental capacity to proceed. La. Code Crim. P. art. 643; State v. Henson, supra; State v. Keys, 346 So.2d 169 (La. 1977). The appointment of a sanity commission to inquire into the mental condition of the accused is addressed to the sound discretion of the trial judge and his ruling will not be disturbed on appeal absent a clear showing of an abuse of discretion. State v. Henson, supra; State v. Nix, 327 So.2d 301 (La. 1975).

In the instant case, defendant failed to produce any evidence which indicated that he lacked the capacity to understand the proceedings against him or to assist in his defense. Neither the testimony of his mother nor that of Dr. Ellington created a reasonable ground to doubt defendant's mental capacity to proceed. The trial judge based his ruling on his prior interrogation of defendant before accepting his guilty pleas and the lack of any evidence indicating a change in defendant's mental capacity to proceed since that time. Hence, we are unable to say that the trial judge abused his discretion in denying the motion to appoint a sanity commission.

Assignment of Error No. 1 is without merit.

ASSIGNMENT OF ERROR NO. 2

Defendant contends the trial judge erred in denying his motion to withdraw his original pleas of guilty grounded on the claim that the pleas were not made voluntarily with understanding of the nature

of the charges.

In defendant's previous appeal to this court, he asserted four assignments of error in which he argued that the Boykin examination had been inadequate, that the trial judge failed to inform him of the elements of each offense charged, that defendant failed to understand the charges or the constitutional rights waived, and that there was no indication of the factual basis for the entry of the guilty pleas. We noted at that time that we were unable to consider the merit of these contentions based on the record before us. We suggested that the same arguments might be raised in an application for a writ of habeas corpus. Acting on two other assigned errors relative to the imposition of sentence, we affirmed defendant's convictions, vacated the sentences, and remanded the case to the trial court for resentencing.

On remand prior to resentencing, defendant filed a motion to withdraw his original guilty pleas based on the identical grounds previously urged on appeal. At a hearing on the motion, defendant testified that he had only entered the guilty pleas on the advice of his then court-appointed counsel and that he failed to understand any of the questions or instructions of the court. Mrs. Lois Franks, defendant's mother, testified that she had no knowledge that her son changed his pleas from not guilty to guilty as she was in the hospital at the time. Finding that the evidence showed no cause to permit the withdrawal of the guilty pleas, the trial judge denied the motion.

La. Code Crim. P. art. 559 provides that the court may permit a plea of guilty to be withdrawn at any time before sentence. Discretion to permit a guilty plea to be withdrawn is vested in the trial judge. That discretion, however, cannot be exercised arbitrarily and abuse of discretion can be corrected on appeal. State v. Compton, 367 So.2d 844 (La. 1979); State v. Andrasi, 343 So.2d 175 (La. 1977).

In the instant case, the record reflects that the trial judge extensively interrogated defendant prior to accepting his pleas of guilty. Defendant was clearly informed of the charges against him and he stated that he understood those charges. Defendant was also informed of the various constitutional rights he would forego by pleading guilty. Defendant had ample assistance of counsel in making his decision to plead guilty. Based on our review of the record, we find that the original guilty pleas were made voluntarily with understanding of the nature of the charges. Hence, the trial judge did not abuse his discretion in refusing to permit defendant to withdraw his guilty pleas.

Assignment of Error No. 2 is without merit.

ASSIGNMENTS OF ERROR NOS. 3 AND 4

Defendant contends the trial judge erred in failing to follow the sentence guidelines set forth in La. Code Crim. P. art. 894.1 and in imposing excessive sentences.

Following acceptance of defendant's pleas of guilty to attempted aggravated

rape and armed robbery, the trial judge ordered a presentence investigation. The minutes indicate that the report stated that defendant abducted a sixteen-year-old female at knifepoint in Delhi and forced the victim to drive to a secluded area near Delhi. There, defendant unsuccessfully attempted to rape the victim at knifepoint and took $70 in cash from her purse. Considering the facts set forth in the report, the trial judge sentenced defendant to serve eighteen years at hard labor for the attempted aggravated rape and thirty years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery. The trial judge expressly directed that the sentences be served consecutively.

On appeal, this court affirmed the convictions but vacated the sentences and remanded the case to the trial court for resentencing because of the failure of the trial judge to state for the record the circumstances taken into account and the factual basis therefor for imposing sentence as required by La. Code Crim. P. art 894.1 and to particularize the justification for the imposition of consecutive rather than concurrent sentences for crimes arising from a single course of conduct.

On resentencing, the trial judge sentenced defendant to serve ten years at hard labor for attempted aggravated rape and forty years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery. The court expressly directed that the sentences were to be served concurrently.

The trial judge stated for the record that defendant was in need of correctional treatment and a custodial environment that could be provided most effectively by his commitment to an institution; that he had considered the content of the presentence report, the seriousness of the crimes to which defendant had admitted, the extreme jeopardy in which the young victim had been placed; that the presentence report reflected that defendant had a juvenile record for burglary and an adult conviction for auto theft in Mississippi for which he had been sentenced to two years imprisonment; and that the court had considered the provisions of La. Code Crim. P. art. 894.1(B) and found no grounds which would cause him to suspend sentence or place defendant on probation. The judge also noted that the maximum sentence that could be imposed for these offenses was one hundred and forty-nine years, whereas the sentences actually imposed were considerably less than the maximum.

La. Const. art. 1, §20 prohibits the imposition by law of excessive punishment. Accordingly, we have held that imposition of a sentence, although within the statutory limit, may violate a defendant's constitutional rights against excessive punishment that is enforceable by this court on appellate review. The trial judge's reasons in imposing sentence, as required by La. Code Crim. P. art. 894.1, are an important aid to this court when called upon to exercise its constitutional function to review a sentence complained of as excessive. State v. Spencer, 374 So.2d 1195 (La. 1979); State v. Gist, 369 Son2d 1339 (La. 1979); State v. Sepulvado,

367 So.2d 762 (La. 1979). Moreover, the trial judge is given a wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by him should not be set aside as excessive in the absence of a manifest abuse of his discretion. State v. Spencer, supra; State v. Sepulvado, supra.

In the instant case, we conclude that the trial judge adequately stated for the record the considerations taken into account and the factual basis therefor for imposing sentence as required by La. Code Crim. P. art. 894.1. Additionally, after reviewing the trial judge's reasons for imposing the sentences, we are unable to say that the sentences are excessive. Clearly, the trial judge did not abuse his discretion.

Assignments of Error Nos. 3 and 4 are without merit.

ASSIGNMENT OF ERROR NO. 5

Defendant contends the sentences imposed on resentencing are more severe than originally imposed in that period of time which he must serve without parole eligibility has been increased. Indeed, under the former sentence, defendant would have been eligible for parole after serving a minimum of thirty-six years.[1] Under the

1. Under the original sentence, defendant would have been eligible for parole after serving the thirty-year term for armed robbery without parole, plus, under the provisions of La. R.S. 15:574.4, one-third of the eighteen-year sentence imposed for attempted aggravated rape; or six years.

new sentence, defendant must serve forty years without parole eligibility. Defendant argues that the new sentence violates his due process rights under the United States Supreme Court decision in North Carolina v. Pearce, 395 U.S. 711 (1969).

In Pearce, the Supreme Court held with respect to resentencing following a successful appeal:

> Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

In State v. Rutledge, 259 La. 543, 250 So.2d 734 (1971), this court followed Pearce in holding that, where a defendant's guilty plea and sentence of one year imprisonment were vacated and defendant was subsequently tried before a jury, convicted and sentenced to two and one-half years imprisonment and the reasons for the disparity between the sentences did not appear in the record, the second more severe sentence was constitutionally objectionable under Pearce. It has also

been held that, where a defendant was resentenced under a statute which extended the period which defendant would have to serve without parole eligibility, the new sentence was more severe under Pearce. United States v. Hawthorne, 532 F.2d 318 (3rd Cir.), cert. denied, 429 U.S. 894 (1976).

In the instant case, it is clear that the extended period of time which defendant would be required to serve under the new sentences without eligibility for parole constitutes a more severe penalty than that originally imposed. Because the reasons for imposing a more severe sentence do not appear in the record, the sentences must be vacated and the case remanded to the trial court for resentencing consistent with this opinion.

DECREE

For the reasons assigned, defendant's convictions are affirmed. The sentences are vacated, and the case is remanded to the district court for resentencing in accordance with the view herein expressed.

CALOGERO, J., concurs.